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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA

4 v.

13 CR 227 (PGG)

5 KEVIN WEINSTEIN,

6 Defendant.

7 -----x

8
9 New York, N.Y.
10 July 25, 2013
11 11:00 a.m.

12 BEFORE:

13 HON. PAUL G. GARDEPHE,

14 District Judge

15
16
17 PREET BHARARA

18 United States Attorney for the
19 Southern District of New York

CHRISTOPHER FREY

20 Assistant United States Attorney

21 DONALD YANELLA

22 Attorney for Defendant

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(Case called)

MR. FREY: Christopher Frey for the government.

MR. YANELLA: Donald Yanella. We're ready.

THE COURT: I'm told that the defendant has an application to withdraw his previously entered plea of not guilty and to enter a plea of guilty to the information.

MR. YANELLA: That's correct, your Honor, and he wishes to do so with a Pimintel letter, which is dated June 19, 2013.

THE COURT: Mr. Ruocco, would you swear the defendant.

(Defendant sworn)

THE COURT: Mr. Weinstein, you should understand you're under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or for making a false statement.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I have an advice-of-rights form and I'm informed it's been signed by you and Mr. Yanella.

Is this your signature on the advice-of-rights form?

THE DEFENDANT: Yes.

THE COURT: We'll mark it as Exhibit One to these proceedings.

Before deciding to accept your guilty plea, I'm required to ask you certain questions. It's important you

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1 answer these questions honestly and completely.

2 The purpose of these proceedings is to make sure you
3 understand your rights and for me to make certain that you're
4 pleading guilty of your own free will and to make sure that
5 you're pleading guilty because you are, in fact, guilty and not
6 for some other reason.

7 Do you understand that?

8 THE DEFENDANT: Yes.

9 THE COURT: If you don't understand any of my
10 questions or you want to consult with Mr. Yanella at any time,
11 say so, because it's important that you understand every
12 question before you answer it.

13 THE DEFENDANT: Sure.

14 THE COURT: State your full name for the record.

15 THE DEFENDANT: Kevin Weinstein.

16 THE COURT: How old are you?

17 THE DEFENDANT: Forty-six.

18 THE COURT: How far did you go in school?

19 THE DEFENDANT: I graduated college.

20 THE COURT: Have you ever been addicted to any drugs
21 or alcohol or been treated for any addiction?

22 THE DEFENDANT: Nothing, not even coffee.

23 THE COURT: Are you now or have you recently been
24 under the care of any kind of doctor?

25 THE DEFENDANT: No.

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1 THE COURT: In the past 24 hours, have you taken any
2 drugs, medicine, or pills or consumed any alcohol?

3 THE DEFENDANT: None.

4 THE COURT: Is your mind clear today and do you
5 understand what is happening?

6 THE DEFENDANT: Yes.

7 THE COURT: Mr. Yarella, any doubt as to
8 Mr. Weinstein's competence to plead guilty this morning?

9 THE DEFENDANT: No.

10 THE COURT: On the basis of Mr. Weinstein's responses
11 to my questions and my observations of his demeanor, I do find
12 that he is competent to enter an informed plea.

13 Have you received a copy of the information in this
14 case, Mr. Weinstein, which contains the charge against you?

15 THE DEFENDANT: Yes.

16 THE COURT: Have you read it?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you want me to read it to you now in
19 open court?

20 THE DEFENDANT: No.

21 THE COURT: You should understand that you are charged
22 in the information with the felony offense of violating 18
23 United States Code Section 2319(a), which deals with
24 unauthorized trafficking in music videos of live performances.

25 THE DEFENDANT: Yes.

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1 THE COURT: Have you had enough time to discuss your
2 case with Mr. Yanella?

3 THE DEFENDANT: Yes.

4 THE COURT: Have you discussed with him the charge
5 against you, as well as your intention to plead guilty?

6 THE DEFENDANT: Yes.

7 THE COURT: Have you discussed with him any possible
8 defenses you might have to this charge, as well as all the
9 facts about this matter?

10 THE DEFENDANT: Yes.

11 THE COURT: Has he told you about the consequences of
12 pleading guilty?

13 THE DEFENDANT: Yes.

14 THE COURT: Are you satisfied with Mr. Yanella's
15 representation of you?

16 THE DEFENDANT: Absolutely.

17 THE COURT: I must explain to you, sir, certain
18 Constitutional rights you have. These are rights you would be
19 giving up if you enter a guilty plea. Listen carefully to what
20 I'm about to say. If you don't understand something, stop me
21 and either myself or Mr. Yanella will explain the matter to you
22 more fully.

23 Under the Constitution and laws of the United States,
24 you have the right to a speedy and public trial by a jury on
25 the charges against you contained in the information.

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1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: If there were a trial, you would be
4 presumed innocent and the government would be required to prove
5 your guilt by competent evidence and beyond a reasonable doubt.
6 You would not have to prove you were innocent at trial.

7 Do you understand that?

8 THE DEFENDANT: Yes.

9 THE COURT: If there were a trial, a jury composed of
10 12 people selected from this district would have to agree
11 unanimously before you could be found guilty.

12 Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: If you decide to go to trial, at that
15 trial and at every stage of the case you would have the right
16 to be represented by an attorney, and if you could not afford
17 one, an attorney would be appointed to represent you at the
18 government's expense and at no cost to you.

19 If you retained a lawyer and you ran out of money, an
20 attorney would be appointed to continue to represent you, to
21 handle your case all the way to trial, and not just for
22 purposes of a guilty plea.

23 Sir, your decision to plead guilty should not depend
24 on whether you can afford a lawyer.

25 Do you understand that?

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1 THE DEFENDANT: Yes.

2 THE COURT: If there were a trial, you would have the
3 right to see and hear all the witnesses against you, and your
4 attorney could cross-examine them. You would have a right to
5 have your attorney object to the government's evidence and to
6 offer evidence on your own behalf. If you so desired, you
7 would have the right to have subpoenas issued to compel
8 witnesses to testify in your defense.

9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: If there were a trial, you would have the
12 right to testify if you wanted to, but no one could force you
13 to testify if you did not want to. Furthermore, no inference
14 or suggestion of guilt could be drawn if you chose not to
15 testify at trial.

16 Do you understand that?

17 THE DEFENDANT: Yes.

18 THE COURT: If you were convicted at a trial, you
19 would have the right to appeal that verdict to a higher court.

20 Do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: Even now as you're entering this plea, you
23 have the right to change your mind, to plead not guilty and go
24 to trial on the charge contained in the information.

25 Do you understand that?

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1 THE DEFENDANT: Yes.

2 THE COURT: If you plead guilty and I accept your
3 plea, you will give up your right to a trial and the other
4 rights I've just discussed, other than the right to an
5 attorney, which you have regardless of whether or not you plead
6 guilty.

7 If you plead guilty, I will enter a judgment of
8 sentence after I have considered a presentence report and
9 whatever submissions I have received from your lawyer and the
10 prosecutor.

11 Do you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: If you plead guilty, you have to give up
14 your right not to incriminate yourself because I will ask you
15 questions about what you did in order to satisfy myself that
16 you're guilty as charged, and you will have to admit and
17 acknowledge your guilt.

18 Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: As I said a moment ago, the information
21 charges you with unauthorized trafficking in music videos of
22 live music performances. I must tell you the elements of that
23 offense.

24 This is what the government would have to prove beyond
25 a reasonable doubt if the case were to go to trial: First, the

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1 government would have to prove that you distributed, offered to
2 distribute, sold or offered to sell, one or more copies of a
3 recording containing the sound or images of live musical
4 performances; second, that you did so for the purpose of
5 commercial advantage or private financial gain; third, at the
6 time you did so, you did not have the consent of the performers
7 involved; and, fourth, that you acted willfully.

8 Do you understand that these are the elements of the
9 offense that you have been charged with in the information?

10 THE DEFENDANT: Yes.

11 THE COURT: I must tell you the maximum and any
12 minimum possible penalty for this crime. The maximum means the
13 most punishment that can possibly be imposed. It does not
14 necessarily mean that it is what you will receive, but you have
15 to understand that by pleading guilty, you are exposing
16 yourself to the possibility of receiving any combination of
17 punishments up to the maximum amount I'm about to describe.

18 Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: The charge in the information carries a
21 maximum sentence of five years' imprisonment, a maximum term of
22 three years of supervised release, a maximum fine of \$250,000,
23 twice the gross pecuniary gain derived from the offense or
24 twice the gross pecuniary loss, as well as a mandatory \$100
25 special assessment.

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1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Parole has been abolished in the federal
4 system, and, accordingly, if you are sentenced to prison, you
5 will not be released early on parole.

6 There is a limited opportunity to earn credit for good
7 behavior, but you will have to serve at least 85 percent of the
8 time you are sentenced to.

9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: As part of your sentence, I have the power
12 to order that you make restitution to any person injured as a
13 result of your criminal conduct, and I can also order you to
14 forfeit certain property to the government.

15 Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: Being convicted of a felony may have other
18 consequences, such as the loss of licenses or the right to
19 possess a firearm. If you are a citizen of the United States,
20 you could lose your right to vote. If you're not a citizen of
21 the United States, you will likely lose your right to remain in
22 the United States and you may be deported.

23 These are examples of the sort of consequences that
24 can flow from a felony conviction. This is not a comprehensive
25 list.

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1 Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: There are sentencing guidelines that I'm
4 required to consult in order to determine an appropriate
5 sentence. Have you spoken with Mr. Yanella about the
6 sentencing guidelines?

7 THE DEFENDANT: Yes.

8 THE COURT: You should understand I will not be able
9 to determine what the recommended sentence is under the
10 guidelines until after a presentence report has been prepared
11 by the U.S. Probation Office and you and the government have
12 had a chance to challenge the facts as they are reported in the
13 presentence report.

14 Do you understand that?

15 THE DEFENDANT: Yes, I do.

16 THE COURT: In this particular case, the government
17 has sent a letter, and Mr. Yanella referenced it a moment ago,
18 a letter dated June 19, 2013. It's referred to in this court
19 as a Pimintel letter. In the letter, the government lays out
20 how it perceives at this point the application of the
21 sentencing guidelines in your case. And, in particular, the
22 government says in the letter that based on their calculations,
23 they conclude that under the guidelines, you're facing a
24 sentencing range of 30 to 37 months of imprisonment.

25 What I want you to understand about the letter is that

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1 it's not binding on me, and I could look at the facts here and
2 do my own evaluation of the sentencing guidelines and come out
3 at a different place than the government asks.

4 The letter is not binding on me in any way, shape, or
5 form and I'll make my own determination after taking into
6 account what the lawyers' views are, but also applying my own
7 understanding of the sentencing guidelines.

8 Do you understand that?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: You should also understand that after I
11 have done that independent review of the sentencing guidelines
12 and determined whether I believe there's a departure that's
13 appropriate either upward or downward from the recommended
14 range under the guidelines, I will then determine what an
15 appropriate sentence is in your case having found not only the
16 sentencing guidelines, but all the factors set forth in the
17 sentencing statute, including the need for the sentence imposed
18 to reflect the seriousness of the offense, to promote respect
19 for the law, to provide just punishment, and to afford adequate
20 deterrence of criminal conduct.

21 Do you understand that?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: You should understand that if your
24 attorney or anyone else has attempted to estimate or predict
25 what your sentence will be, that their estimate or prediction

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1 could be wrong.

2 Do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: No one, not even your attorney or the
5 prosecutor, can or should give you any assurance of what your
6 sentence will be. Your sentence cannot be determined until
7 after the presentence report is prepared and I have ruled on
8 any challenges to the report, determined whether I believe
9 there are grounds to depart upwards or downwards from the
10 recommended range under the guidelines and other determinations
11 on what an appropriate sentence is in your case.

12 Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: You should fully understand that even if
15 your sentence is different from what your attorney or anyone
16 else told you it might be or if it is different from what you
17 expect, you will still be bound by your guilty plea and you
18 will not be allowed to withdraw your plea of guilty.

19 Do you understand that?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: Mr. Yanella, do you know of any valid
22 defense that would prevail at trial or any other reason why
23 Mr. Weinstein should not be permitted to plead guilty?

24 MR. YANELLA: No.

25 THE COURT: Does the government represent there's an

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adequate factual basis to support a guilty plea?

MR. FREY: Yes.

THE COURT: Mr. Weinstein, we have reached the point in the proceedings where I need you to tell me what you did that makes you believe that you are guilty of the crime charged in the information.

THE DEFENDANT: Between October 2011 and June 2012 without authorization from the musicians, I sold music videos of live musical performances on the internet. During this period, I negotiated with my customers over the internet while I was in Manhattan, and I also used a mailbox in Manhattan. I knew that unauthorized selling of live musical performances was illegal.

I'm an avid music lover for all types of music; therefore, commercial gain was not my main motivation, but I am guilty of this charge.

THE COURT: I take it that you actually sold these videos, so you received some form of compensation for the sale of them?

THE DEFENDANT: Yes.

THE COURT: Any other questions the government wants to ask Mr. Weinstein?

MR. FREY: No, your Honor. That's legally sufficient.

THE COURT: Mr. Weinstein, are you pleading guilty because you are guilty, and are you pleading guilty voluntarily

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1 and of your own free will?

2 THE DEFENDANT: I sure am.

3 THE COURT: Then I'll ask you now, how do you plead as
4 to the charge in the information, guilty or not guilty?

5 THE DEFENDANT: Yes, guilty.

6 THE COURT: Does the government wish me to allocute
7 Mr. Weinstein on the forfeiture allegation in the information?

8 MR. FREY: Yes, please, your Honor.

9 THE COURT: Mr. Weinstein, the information includes a
10 forfeiture allegation in which the government puts you on
11 notice that it seeks any and all property constituting or
12 derived from any proceeds obtained directly or indirectly as a
13 result of the offense charged in the information, as well as
14 any and all property used, or intended to be used, in any
15 manner or part to commit or to facilitate the commission of the
16 offense charged in the information.

17 Do you admit the forfeiture allegation as set forth in
18 the information?

19 THE DEFENDANT: Yes.

20 THE COURT: Because you acknowledge that you're guilty
21 as charged in the information, because I find that you know
22 your rights and you're waiving them knowingly and voluntarily,
23 because I find your plea is entered knowingly and voluntarily
24 and is supported by an independent basis in fact containing
25 each of the essential elements of the offense, I accept your

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1 guilty plea and adjudge you guilty of the offense to which you
2 have pled guilty.

3 I will order a presentence report. I ask you to
4 cooperate with the people who prepare the report because it
5 will be important to me in making my determination as to what
6 your sentence will be.

7 Once the presentence report is prepared, you and
8 Mr. Yanella will have an opportunity to review the report. I
9 urge you to review it carefully with him. If there are any
10 misstatements in the report, point them out to Mr. Yanella so
11 he can point them out to me so I don't proceed on the basis of
12 mistaken information.

13 I'm going to put the sentencing down for December 3,
14 2013, at 2:30 p.m. Any written submissions by the defendant
15 will be due November 19. Any response by the government will
16 be due November 26.

17 Anything further?

18 MR. FREY: No.

19 MR. YANELLA: No.

20 THE COURT: Thank you.

21 (Adjourned)
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24
25